IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-101

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

No. 76-205

THE HONORABLE SHIRLEY CHISHOLM, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been officially reported. It is reproduced as Appendix 2 to the petition filed by the Democratic National Committee (DNC). The *Memorandum Opinion and Order*, comprising a declaratory order, of the Federal Communications Commission (Commission) is reported at 55 F.C.C.2d 697 (1975) and is reproduced as Appendix 1 of the DNC petition.

JURISDICTION

The order of the court of appeals denying rehearing of its prior order affirming the action of the Commission was entered on May 13, 1976. The DNC petition for writ of certiorari was filed on July 23, 1976 and the petition of The Honorable Shirley Chisholm, *et al.* (Chisholm) was filed on August 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

QUESTIONS PRESENTED[2]

1. Whether the court below erred in holding that the Commission had acted within its permissible discretion in changing its interpretation of the "on-the-spot coverage of bona fide news events" exemption from the equal opportunities requirement of Section 315(a) of the Communications Act of 1934, as amended, to include within that exemption broadcast coverages of non-studio debates between candidates and of press conferences by candidates.

2. Whether the court below erred in concluding that the Commission was not required to proceed by informal

[1] The time for non-federal respondents to file briefs in opposition to the DNC petition was extended to September 10, 1976.

[2] Our statement of "questions presented" is based upon both petitions.

rulemaking, and could instead proceed by declaratory order, in announcing a changed interpretation of the Section 315(a)(4) exemption.

STATUTE INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), is set forth in the DNC petition at Appendix 4 and in the Chisholm petition, in pertinent part, at page 3.

STATEMENT

In 1959, Congress amended Section 315(a) of the Communications Act of 1934, as amended, to exempt from the equal opportunities requirement four categories of news coverage: bona fide newscast, bona fide news interview, bona fide news documentary, and on-the-spot coverage of bona fide news events (the last sometimes referred to herein as the (a)(4) exemption).[3] The broad purpose of the legislation was to permit broadcast journalism to provide more complete coverage of political candidates in news-type programs, without the strictures of equal opportunities obligations to all other candidates.[4] The legislative history makes clear that Congress did not undertake to define with precision the specific content of the (a)(4) exemption, but instead left that task to the Commission.[5]

[3] P.L. 86-274, § 1, 73 Stat. 557, amending 47 U.S.C. § 315.

[4] *See, generally*, S. Rep. No. 562, 86th Cong., 1st Sess. (1959); Hearings on Political Broadcasts—Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., comment of Chairman Harris at 2 (1959).

[5] *See* S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959); Hearings on S. 1585, S. 1604, S. 1858 and S. 1929 Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 96 (1959).

In two 1962 rulings involving non-studio debates between gubernatorial candidates, the Commission held that live broadcast coverage of such debates would not qualify for the on-the-spot coverage of a bona fide news event exemption.[6] Similarly, in a 1964 ruling the Commission held that live broadcast coverage of an incumbent president's press conference would not qualify under this exemption.[7] For a period of years these three rulings (hereinafter referred to as the *Wyckoff*, *Goodwill Station* and *1964 CBS* rulings) were considered by the Commission, the broadcast industry, and presumably others to be the applicable law.

In 1975, in response to separate petitions from the Aspen Institute Program on Communications and Society (Aspen Institute) and CBS Inc. (CBS), the Commission re-examined its *Wyckoff*, *Goodwill Station* and *1964 CBS* interpretations. After considering comments from DNC, the Honorable Shirley Chisholm, the National Organization for Women and others (including 1976 presidential candidates), the Commission (two Commissioners dissenting) issued a declaratory order announcing that it was reversing its interpretations and henceforth would consider good faith on-the-spot broadcast coverage of non-studio debates between candidates and of candidate press conferences as qualifying under the on-the-spot coverage of a bona fide news event exemption.

Petitioners DNC and Chisholm sought review in the United States Court of Appeals for the District of Columbia Circuit. The court (one Judge dissenting) affirmed the Commission, concluding that the Congress had assigned to the Commission the task of giving specific content to these exemptions and that the Commission had acted within its permissible discretion in reversing its

[6] National Broadcasting Co. (Wyckoff), 40 F.C.C. 370 (1962); The Goodwill Station, Inc., 40 F.C.C. 362 (1962).

[7] Columbia Broadcasting System, Inc., 40 F.C.C. 395 (1964).

earlier interpretations. The court also found no infirmity in the Commission's procedure. Rehearing was denied.

American Broadcasting Companies, Inc. (ABC) operates national television and radio networks and is the licensee of television and radio stations in a number of communities. It has welcomed the Commission's ruling, because of the potential for greater news coverage of principal and major party candidates.

ARGUMENT

Petitioners advance essentially two reasons for granting the writ. The first is that this case "concerns an important issue with broad ramifications" (Chisholm petition, p. 7). The second is that the procedure followed by the Commission "conflicts with and misapplies principles set forth by this Court". (Chisholm petition, p. 15).

I. This Case Does Not Present An Issue Of Sufficient Importance To Warrant Review

By its reinterpretation of the Section 315(a)(4) exemption, the Commission has undoubtedly expanded the amount of news-type coverage which broadcasters may give to some political candidates, without incurring equal opportunities obligations to other candidates. Potentially at least, this is true at all levels of government—federal, state and local. However, it is questionable how much impact the Commission's ruling will have beyond a few major races.

The ruling is narrow, even if its logic may extend beyond debates and press conferences to some other news events. This is because in the case of all such events the broadcaster must still make the judgment that on-the-spot coverage is warranted. As a practical matter, ABC considers it unlikely that the Commission's ruling is going to have vast impact. Its significance appears to

be primarily in the case of contests such as the current presidential campaign.

However, even accepting petitioners' thesis that the ruling will have broad ramifications at all levels of the electoral process, it does not follow that the Court is being asked to review an important *legal* question (see Rule 19(b)). Many administrative agency rulings have broad economic, social or political impact. Yet this fact does not mean that they present important issues of law. We respectfully suggest that the question to be resolved on these petitions for writ of certiorari is whether the Commission's action, and the lower court's affirmance thereof, involved something other than routine application of well established legal principles.

In adopting the 1959 amendments to Section 315 Congress intended to relax the strict, mechanistic equal opportunities rule in order to permit expanded news coverage of political candidates by the broadcast media.[8] It did so with the recognition that there were some risks, in terms of the original policy objectives of Section 315.[9] And it did so in the form of general exemptions, leaving to the Commission the task of giving content to those exemptions, consistent with Congressional intent and purpose.[10]

Against this background, in 1962 the Commission concluded that non-studio debates between major party candidates were not "bona fide news events"; in 1964 it reached a similar conclusion as to presidential press conferences. In 1975 the Commission reversed these earlier interpretations and ruled that in the future it would find non-studio debates and candidate press conferences to be bona fide news events if broadcasters, in their good faith news judgment, chose to give on-the-spot coverage to them as such.

[8] The amendments were preceded by the Commission's ruling in the Lar Daly case, Columbia Broadcasting System, Inc., 18 P & F Radio Reg. 238, *reconsideration denied*, 26 P & F Radio Reg. 701 (1959), interpreting Section 315 to mean that the equal time rule applied even to the appearance of a candidate on a routine newscast. As the court of appeals noted, this ruling created a national furor in some circles.

[9] *See* S. Rep. No. 562, 86th Cong., 1st Sess. 10 (1959).

[10] *See* note 5, *supra; see also* 105 Cong. Rec. 16227 (1959) (remarks of Rep. Celler) and 105 Cong. Rec. 14455 (1959) (remarks of Sen. Pastore).

What the court of appeals had to decide was whether there was anything in the statute, its legislative history, subsequent Congressional action or inaction, judicial interpretation, or otherwise, to preclude such a change of interpretation. Thus, the court of appeals carefully examined the legislative history, which contains material which would support *either* the Commission's earlier or its 1975 rulings. It considered the significance of subsequent Congressional action and inaction, including awareness of the 1962 and 1964 interpretations. It considered the judicial interpretations urged by petitioners. And it considered all the other arguments petitioners advanced as to why the Commission was bound to its 1962 and 1964 interpretations. Having done this, the court concluded that the Commission was not bound to its 1962 and 1964 interpretations; that the 1959 amendments gave the Commission discretion; and that there was substantial support for the 1975 interpretation, even if it was not the only permissible interpretation.

We respectfully submit that what the Commission did, including a re-examination and reversal of its prior statutory interpretations, and the standards by which the court of appeals reviewed that action, are in the mainstream of the regulatory process and raise no important question which this Court need consider.

As a general proposition and apart from the specifics of Section 315 and the 1959 amendments thereto, the courts have long recognized that the Communications

Act granted to the Commission expansive powers.[11] These powers derive both from various provisions in the Act, including those authorizing the Commission "generally [to] encourage the larger and more effective use of radio" (47 U.S.C. § 303(g)) and to adopt rules and regulations implementing the provisions of the Act (47 U.S.C. § 303 (r)), and from the Act's touchstone—the public interest.

The Commission and the courts have also recognized that broadcasting performs a vital social function when it acts as an information medium. Thus, the Commission is directly concerned that stations present news, public affairs, political and other forms of informational programming designed to inform the public generally and the electorate particularly.[12] These aspects of the broadcaster's responsibility have been the subject of this Court's consideration in two comparatively recent cases, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). Common to both cases is the recognition that under the Communications Act regulatory and licensing scheme, it is the broadcaster's responsibility to deal with controversial issues and to do so in a fair and even-handed manner.

Further, the courts have acknowledged that the Commission is entitled "to consider its total regulatory responsibilities when dealing with problems within a particular area of its jurisdiction." *General Telephone Co. of California* v. *FCC*, 134 U.S.App.D.C. 116, 125-26, 413 F.2d 390, 399-400, *cert. denied*, 396 U.S. 888 (1969).[13]

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[11] *See, e.g.*, Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134 (1940).

[12] Report and Statement of Policy Res: Commission en banc Programming Inquiry, 44 F.C.C. 2303 (1960); Fairness Report, 48 F.C.C.2d 1 (1974).

[13] *See also* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); Carter Mountain Transmission Corp. v. FCC, 116 U.S.App. D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951 (1963).

It is with these principles in mind that the Commission's change of regulatory course with respect to the scope of the (a)(4) exemption should be assessed. For it was fully consistent with the general concept of the Communications Act, including broadcaster responsibilities in the presentation of news-type programming, for the Commission to decide upon a construction of the (a)(4) exemption which makes possible more effective news coverage.

The broad administrative and communications law principles which support the Commission's statutory construction action in this case are not unique to the communications field. In *American Trucking Ass'n.* v. *A.T. & S.F.R. Co.*, 387 U.S. 397 (1967), this Court rejected an argument, similar to that of the instant petitioners, that a long history of construction and application of the Interstate Commerce Act precluded a change of approach:

> . . . [W]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. Compare SEC v. Chenery Corp., 332 U.S. 194 . . . (1947); FCC v. WOKO, 329 U.S. 223 . . . (1946). In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flexibility and adaptability to changing needs and patterns . . . is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

387 U.S. at 416 (citations omitted).

Rejecting the notion that Congressional acceptance of prior rulings was dispositive, this Court went on to state:

> We do not regard this as legislative history demonstrating a congressional construction of the meaning of the statute, nor do we find in it evidence of an administrative interpretation of the Act which should tilt the scales against the correctness of the Commission's conclusions as to its authority to prescribe the present rules.

387 U.S. at 417-18 (footnote omitted).

Thus, without denigrating the importance of consistency of administrative interpretation, its seems clear that the Communications Act regulatory scheme is one which provides the ability, indeed responsibility, to change course where the Commission concludes that its regulatory direction is no longer correct. Of course, the courts have stressed that the Commission must explain and justify its actions, and that burden is clearly greater when it reverses long standing interpretations. See *Columbia Broadcasting System, Inc.* v. *FCC*, 147 U.S. App. D.C. 175, 454 F.2d 1018 (1971). Here, the Commission decided that its prior construction of the (a)(4) exemption was erroneous. It fully explained its action, including reasons for that action. Its re-examination was "faithful and not indifferent to the rule of law." *Id.* at 183, 454 F.2d at 1026.

II. The Procedure Followed By The Commission Was Consistent With Principles Set Forth By This Court

The 1962 rulings in *Wyckoff* and *Goodwill Station* and *1964 CBS* were all *ad hoc* adjudications.[14] Indeed, historically the Commission has given content to Section

[14] Congress specifically contemplated that the 1959 amendments would be implemented, at least in part, by *ad hoc* adjudications. S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959).

315 through the process of *ad hoc* adjudications.[15] The 1975 declaratotry order of which petitioners complain was also an adjudication.

The Chisholm petition argues that it was improper for the Commission to reverse, prospectively, its *Wyckoff*, *Goodwill Station* and *1964 CBS* rulings without proceeding through informal (notice and comment) rulemaking,[16] relying particularly upon *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) and *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). The court of appeals did not agree with petitioner's interpretation of these cases, concluding instead that the Commission had discretion to proceed by *ad hoc* litigation; that since the interpretations being reversed were reached by adjudication, reversal by adjudication was particularly appropriate; and that in the circumstances of this ruling there was no advantage to be gained by requiring the Commission to proceed by rulemaking.

As a threshold matter, it should be recognized that the Commission's ruling here under consideration was, first and foremost, *statutory interpretation*. To the extent that it was rulemaking at all, it was *interpretive* rulemaking which is exempt from the procedural requirements of Section 4 of the Administrative Procedure Act (5 U.S.C. § 553 (1970)).

At least since *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947), it has been well

[15] From time to time, the Commission publishes a compendium of interpretive Section 315 rulings. *See* Use of Broadcast Facilities by Candidates for Public Office, 19 Fed. Reg. 5948 (1954); 23 Fed. Reg. 7817 (1958); FCC 60-1050, Public Notice 92294, 20 P & F Radio Reg. 1564 (1960); 27 Fed. Reg. 10063 (1962); 29 Fed. Reg. 11286 (1964); 31 Fed. Reg. 6660 (1966); 35 Fed. Reg. 13048 (1970); and Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 37 Fed. Reg. 5796 (1972).

[16] *See* Administrative Procedures Act § 4, 5 U.S.C. § 553 (1970).

established that an administrative agency has broad discretion to proceed either by general rule or by *ad hoc* adjudication. Neither *Bell Aerospace* nor *Wyman-Gordon*, relied upon by petitioner, conflicts with *Chenery*, even though they and *Chenery*, taken together, indicate that there may be circumstances under which rulemaking is preferred and, indeed, instances where a failure to proceed by rulemaking could be construed as an abuse of discretion. However, that is hardly the case here. As indicated above, the Commission has long interpreted Section 315 through adjudicatory rulings, as Congress contemplated. It did so in the *Wyckoff*, *Goodwill Station* and *1964 CBS* rulings. In this case, it merely followed well established and Congressionally sanctioned procedure.

Moreover, as the court of appeals noted, there was no advantage to be gained by requiring the Commission to resort to rulemaking. Petitioners in this court were heard before the Commission on the Aspen Institute and CBS petitions; other parties, including candidates for presidential nomination, were heard.[17] The Commission considered the views of these parties. While the procedure may not have yielded the identical record which would have been compiled through rulemaking, given the basic premise that the agency has a high degree of discretion and the fact that petitioners were heard by the agency, it follows that the Commission's procedure was adequate. Cf. *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 36; 405 F.24 1082, 1104 (1968), *cert. denied*, 396 U.S. 842 (1969).

[17] No party sought rehearing or reconsideration of the Commission's action under 47 U.S.C. § 405 and implementing provisions of the Commission's Rules (47 C.F.R. § 106 (1975)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writ of certiorari should be denied.

Respectfully submitted,

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September 10, 1976